



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: MAY 16, 2023

IN THE MATTER OF:

Appeal Board No. 606854

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determinations (including March 7, 2017, and March 13, 2018), assessing NYC INDIAN CHINESE FOOD, INC., DBA TALK OF THE TOWN (hereinafter "the employer" or "the Restaurant"), liable (1) for additional tax contributions, effective 1st quarter 2013 through 1st quarter 2016, in the amount of \$16,709.14 based on estimated remuneration paid to estimated six workers, and (2) for a fraud penalty pursuant to Labor Law § 570

(4). Requesting a hearing, the employer objected to the estimated assessment and fraud penalty. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed May 20, 2019 (), the Judge (1) granted the employer's application to reopen two prior cases, (2) overruled the Commissioner of Labor's timeliness objection, (3) sustained the initial determination assessing additional tax contributions of \$16,709.14, and (4) overruled the initial determination assessing a fraud penalty.

The employer appealed the Judge's decision to the Appeal Board, insofar as the decision sustained the \$16,709.14 assessment. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

By remand order filed March 22, 2023, the Board ordered another hearing. A

telephone conference hearing was held at which evidence was taken. There were appearances on behalf of the Commissioner. The employer's attorney made a limited appearance to report that the Restaurant is no longer in business and that the Restaurant's principals were not reachable via mail or telephone.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Two corporate owners/officers operated a full-service restaurant located in Jackson Heights, New York that seated about 45 patrons. The business was generally open seven days a week but closed holidays and occasional bad weather. Scheduled hours of operation were from 12 PM to 11 PM, but the Restaurant closed as early as 9:30 or 10:00 PM when business was slow.

During the audit period, in addition to the occasional non-family member W-2 employees (up to two individuals), a total of six familial individuals worked at the restaurant - Officer1 (Mohammed Mahbubur Rahman), his wife, father, and younger brother, and Officer2 (Mohammed Faisul) and his wife. Both corporate officers generally worked open to closing, 6 days per week. Officer2 performed most of the cooking, supplemented by Officer1's father. Serving the food and handling the register was covered by all other workers. During the busier times after 6 PM, other individuals were available "as needed", including the Officers' wives, Officer1's father, and Officer1's younger brother. With respect to the younger brother, he "would just run over to the restaurant to help any way [he] can, bus tables, clean the dishes" whenever he was called upon during busy times like holidays and some Saturdays; he attended school; and he was not paid because he lived in the same household "for free" and "it was our family business".

The Department of Labor conducted an audit of the Restaurant's books and records, including the provided quarterly payroll summaries, disbursements journal, federal income tax returns, IRS 941 forms, IRS 940 forms, IRS W-2 forms, and NYS-45 forms. Throughout the audit period, the Restaurant reported W-2 earnings for both corporate officers, plus one to three other employees, for a total of three in 2013, four in 2014, five in 2015, and four in 2016. For example, the Restaurant reported remuneration, in 2013, in the amounts of \$12,025, \$14,560, and \$11,050 (each exceeding the statutory annual maximum of \$8,500); and, in 2015, in the amounts of \$11,050, \$7,800, \$11,050, \$10,725, and \$1,950. During the audit period, up to two acknowledged employees were non-family members, and the Restaurant provided occasional cash payments to three family members who "mostly volunteered", namely, the Officers' wives and

Officer1's father (hereinafter "3 family members"). The Restaurant did not keep payroll records for these occasional cash payments to the 3 family members.

Based, in part, on a cash-based business and the lack of cash payroll records, the auditor estimated the amount of contributions due. The auditor determined the "estimated gross payroll" based on a minimum wage calculation, which was determined by taking the annual operational hours (12 PM to 11 PM for 7 days per week for 52 weeks), times the total payroll hours (3 workers per site visit observation), times the current minimum wage. Pursuant to this minimum wage calculation, the Department estimated, in part, that the Restaurant required a total of six workers during the audit period. The Department further included estimated tips and meals.

OPINION: Pursuant to Labor Law § 560 (1), any employer shall become liable for

contributions under Labor Law, Article 18, if the employer has paid remuneration of \$300 or more in any calendar quarter. Such liability shall commence on the first day of such calendar quarter. Also, pursuant to Labor Law § 517 (1), remuneration means every form of compensation for employment

paid by an employer to an employee, whether paid directly or indirectly by the employer, including salaries, commissions, and bonuses. Furthermore, Labor Law § 575 (1) requires every employer to "keep a true and accurate record of each

person employed by him, the name and social security account number, and the amount of remuneration paid to each, and such other records as are necessary under this article in the manner prescribed by regulations of the commissioner and shall furnish to the commissioner, upon demand, a sworn statement of the same. Such records, together with all other records reflecting or bearing upon them, shall be open to inspection at any time and as often as may be necessary to verify the number of employees, the periods of their employment, and the amount of their remuneration. Every employer shall report information from such records at such time and in such manner as the commissioner may by regulation prescribe." Moreover, where such payroll records are not produced, Labor Law § 571 authorizes the Commissioner of Labor to estimate an amount of

tax contributions due based on available information. See, Matter of Mamash Rest. Corp., 270 AD2d 723 (3d Dept 2000); Matter of Calon, DBA Tony's Taxi, 257 AD2d 855 (3d Dept 1999); Matter of Wapnick, 167 AD2d 622 (3d Dept 1990),

appeal dismissed sua sponte 77 NY2d 939 (1991); and Matter of Enelra Cab Corp., 132 AD2d 864 (3d Dept 1987).

The evidence establishes that the Restaurant underreported its payroll during the audit period. Here, the Officer admitted that the 3 family members "mostly volunteered", but concedes that they were occasionally paid for their services provided on behalf of the corporation. Significantly, no matter how often or occasional the cash payments were made to these 3 family members, without cash payroll records, the evidence would demonstrate a minimum of five workers (2 officers and 3 family members) and a maximum of seven workers (2 officers, 3 family members, and 2 non-family members). Also, the Board finds negligible the Restaurant's occasional closing and closing earlier than advertised. Where the business is a full-service restaurant with seating for 45 patrons, the Department's estimate of a total of six workers throughout the entire year is not unreasonable. Under these circumstances, the audit assessment of additional tax contributions should be sustained. See e.g., Appeal Board No. 603714; Appeal Board No. 603644; Appeal Board No. 602941; Appeal Board No. 601642; Appeal Board No. 597250; and Appeal Board No. 564033.

DECISION: , insofar as appealed, is affirmed.

The initial determinations, assessing NYC INDIAN CHINESE FOOD, INC., DBA TALK OF THE TOWN, liable for additional tax contributions, effective 1st quarter 2013 through 1st quarter 2016, in the amount of \$16,709.14 based on estimated remuneration paid to estimated six workers, are sustained.

GERALDINE A. REILLY, MEMBER